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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TRUTHOUT
3539 Bradshaw Road #B-166
Sacramento, CA 95827,

Plaintiff,

v.

DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530,

Defendant.

Case No.:

Civil Complaint (FOIA)

* * * * *

1 TO THE HONORABLE COURT

2 Plaintiff Truthout brings this action against Defendant Department of Justice pursuant to
3 the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, *as amended* (“FOIA”), the Federal
4 Declaratory Judgment Act, 28 U.S.C. § 2201, and the All Writs Act, 28 U.S.C. § 1651.

5 **JURISDICTION**

6 1. This Court has both subject matter jurisdiction over this action and personal
7 jurisdiction over Defendant pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

8 **VENUE**

9 2. Venue is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391.

10 **PARTIES**

11 3. Plaintiff Truthout is a non-profit organization under the laws of the state of
12 California and has the ability to disseminate information on a wide scale.

13 4. Defendant Department of Justice (“DOJ”) is an agency within the meaning of 5
14 U.S.C. § 552(e), and is in possession and/or control of the records requested by Plaintiff which
15 are the subject of this action.

16 5. The Federal Bureau of Investigation (“FBI”) is a DOJ component.

17 **FIRST CAUSE OF ACTION**

18 **(CONSTRUCTIVE DENIAL – 1164662-000)**

19 6. Plaintiff repeats and realleges the allegations contained in all paragraphs set forth
20 above.

21 7. On 12 April 2011 Truthout submitted to FBI a FOIA request for all records about
22 Hesham Abu Zubaidah, brother of Zayn al-Abidin Muhammad Husayn, a/k/a Abu Zubaydah, a
23 high-value detainee currently imprisoned at Guantanamo Bay. Truthout included a privacy

1 waiver signed by Hesham Abu Zubaidah. Truthout also requested expedited processing of its
2 request.

3 8. On 26 August 2011 FBI acknowledged receipt of this request and assigned it
4 Request No. 1164662-000. FBI did not adjudicate Truthout's request for expedited processing.

5 9. On 22 September 2011 FBI informed Truthout that it had located approximately
6 1200 pages of responsive records and insisted that Truthout commit to pay an estimated fee of
7 \$35. On 26 September 2011 Truthout provided FBI with this commitment.

8 10. On 30 September 2012 FBI made an interim release of redacted responsive
9 records to Truthout.

10 11. As of this writing FBI has not issued a final determination for this request.

11 12. As of this writing FBI has not granted Truthout expedited processing for this
12 request.

13 13. As twenty working days have elapsed without substantive determinations by FBI,
14 Truthout has exhausted all required administrative remedies. Truthout is not required to file an
15 administrative appeal of FBI's interim release in the absence of a final adverse determination.
16 *See Rosenfeld v. DOJ*, No. 07-3240, 2008 U.S. Dist. LEXIS 64620, at *24 (N.D. Cal. Aug. 22,
17 2008).

18 14. Truthout has a legal right under FOIA to obtain the information it seeks, and there
19 is no legal basis for the denial by FBI of said right.

20 15. Truthout has a legal right under FOIA to have its request processed in an
21 expeditious manner, and there is no legal basis for the denial by FBI of said right.
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SECOND CAUSE OF ACTION

(DENIAL – 1196660-000)

16. Plaintiff repeats and realleges the allegations contained in all paragraphs set forth above.

17. On 26 August 2011 an FBI special agent interviewed Hesham Abu Zubaidah in his home regarding the privacy waiver he had signed for Truthout's FOIA request. In this interview the special agent attempted to convince Mr. Zubaidah to rescind the privacy waiver.

18. After learning of the 26 August 2011 interview, Truthout reporter Jason Leopold contacted FBI to ask why agents were interfering with Truthout's FOIA request. Multiple FBI representatives, including David Hardy, the chief of the FOIA office, informed Mr. Leopold that such interviews were "routine" and were done to ensure that privacy waivers were not forged or signed under duress.

19. Despite diligent research, Truthout has not located a single other instance in which FBI has interviewed the subject of a FOIA request regarding a privacy waiver.

20. On 19 July 2012 Truthout submitted to FBI a FOIA request for "all FBI records pertaining to instances in which the FBI has dispatched special agents, or any other FBI officials, to make personal visits to the homes, workplaces, and/or have directed said officials to personally call third parties who have signed Privacy Act waivers authorizing individuals or organizations to file FOIA requests on behalf of the third party to discuss and/or determine the legitimacy of the FOIA requests the third parties authorized and the authenticity of signatures on Privacy Act waivers."

21. On 15 August 2012 FBI acknowledged receipt of this request and assigned it Request No. 1196660-000. FBI stated: "Please be advised that it is the FBI's policy to neither

1 confirm nor deny the existence of any records which would tend to indicate or reveal whether an
2 individual or organization is of investigatory interest to the FBI. Acknowledging the FBI's
3 interests invites the risk of circumvention of federal law enforcement efforts. Thus, pursuant to
4 FOIA, 5 U.S.C. § 552 exemption (b)(7)(E), the FBI neither confirms nor denies the existence of
5 records which would indicate whether an individual or organization is or has ever been of
6 investigatory interest."

7 22. On 12 September 2012 Truthout appealed this determination to the DOJ Office of
8 Information Policy ("OIP"). Truthout specifically argued, "This request was not for records
9 regarding which people were of investigatory interest to the FBI, it was for records about how
10 the FBI processed FOIA requests, specifically, instances in which FBI agents conducted
11 interviews to determine if private parties had given consent for the release of their records, as
12 occurred during the processing of Truthout's FOIA Request No. 1164662-000."

13 23. On 27 September 2012 OIP acknowledged this appeal and assigned it Appeal No.
14 AP-2012-03443.

15 24. As of this writing OIP has not issued a final determination for this appeal.

16 25. As twenty working days have elapsed without a substantive determination by
17 DOJ, Truthout has exhausted all required administrative remedies.

18 26. Truthout has a legal right under FOIA to obtain the information it seeks, and there
19 is no legal basis for the denial by DOJ of said right.

20 27. Truthout has a legal right under FOIA to have its request processed in an
21 expeditious manner, and there is no legal basis for the denial by FBI of said right.
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PRAYER FOR RELIEF

WHEREFORE, Plaintiff Truthout prays that this Court:

- (1) Order the Federal Bureau of Investigation to provide all responsive records to it as soon as practicable;
- (2) Order FBI to process Truthout's requests in an expedited fashion;
- (3) Order preliminary and permanent injunctive and/or declaratory relief as may be appropriate;
- (4) Award reasonable costs and attorneys' fees as provided in 5 U.S.C. § 552(a)(4)(E), 28 U.S.C. § 2412(d), or any other applicable law;
- (5) Expedite this action in every way pursuant to 28 U.S.C. § 1657(a); and
- (6) Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

Date: October 18, 2012

ELECTRONIC FRONTIER
FOUNDATION

By: 

Jennifer Lynch
Attorney for Truthout